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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re R.R., a Person Coming Under the Juvenile
Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

R.R.,

Defendant and Appellant.

F072735

(Super. Ct. No. MJL017995-B)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Madera County. Thomas L.
Bender, Judge.

Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Michael P. Farrell, Assistant Attorney General, for Carlos A. Martinez and Kari
Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J. and Smith, J.

On October 23, 2015, following a contested jurisdictional hearing, the juvenile court found true allegations that R.R., a minor, committed misdemeanor battery for the benefit of a criminal street gang (Pen. Code, §§ 242, 186.22, subd. (d)).¹ The court found that minor was a person described by the provisions of Welfare and Institutions Code section 602.²

At the dispositional hearing on November 10, 2015, the juvenile court continued minor as a ward of the court, and ordered him into the Madera Juvenile Correctional Camp for one year.

On appeal, minor contends the court erroneously (1) failed to consider whether he was eligible for the deferred entry of judgment (DEJ) program (§ 790 et seq.), and (2) failed to declare, on the record, whether the battery was a felony or misdemeanor. The People concede on both points. We agree and remand for further proceedings.

DISCUSSION

I. Deferred Entry of Judgment

The parties agree that we must reverse and remand for further proceedings because the court failed to determine whether minor is eligible for the DEJ program. We agree.

The DEJ provisions have been explained as follows:

¹ Penal Code section 186.22, subdivision (d) provides: “Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in a county jail not to exceed one year, or by imprisonment in a state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail.”

² All statutory references are to the Welfare and Institutions Code unless otherwise noted.

“The DEJ provisions of section 790 et seq. were enacted as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998, in March 2000. The sections provide that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed. (§§ 791, subd. (a)(3), 793, subd. (c).)” (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558.)

Under the DEJ statutory scheme, the prosecutor has the initial duty to assess the eligibility of the minor for DEJ. Either before the filing of the wardship petition or as soon as possible thereafter, the prosecutor must review the minor’s file and, if the prosecutor determines the minor meets the DEJ eligibility requirements, must notify the court of his or her determination (§ 790, subd. (b); Cal. Rules of Court, rule 5.800(b)(1);³ *In re Luis B.* (2006) 142 Cal.App.4th 1117, 1122 (*Luis B.*)) and provide “written notification to the minor,” which must include “[a] full description of the procedures for deferred entry of judgment” (§ 791, subd. (a)(1)) and “[a] clear statement that, in lieu of jurisdictional and disposition hearings, the court may grant a deferred entry of judgment with respect to any offense charged in the petition, provided that the minor admits each allegation contained in the petition and waives time for the pronouncement of judgment” (§ 791, subd. (a)(3)).

A minor is eligible for DEJ under section 790 if he or she is accused in a juvenile wardship proceeding of committing a felony offense and all of the following circumstances apply:

“(1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense. [¶] (2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707. [¶]

³ All rule references are to the California Rules of Court.

(3) The minor has not previously been committed to the custody of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. [¶] (4) The minor’s record does not indicate that probation has ever been revoked without being completed. [¶] (5) The minor is at least 14 years of age at the time of the hearing. [¶] (6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code.” (§ 790, subd. (a)(1)-(6).)

If the prosecutor finds the minor eligible, the separate question of the minor’s “suitability” for DEJ remains. (*Luis B.*, *supra*, 142 Cal.App.4th at p. 1123.) “The trial court then has the ultimate discretion to rule on [this question] after consideration of [certain] factors specified [by statute and rule of court], and based upon the ‘standard of whether the minor will derive benefit from ‘education, treatment, and rehabilitation’ rather than a more restrictive commitment.” ’ ” (*Ibid.*) But “[w]hile the court retains discretion to deny DEJ to an eligible minor, the duty of the prosecuting attorney to assess the eligibility of the minor for DEJ and furnish notice with the petition is mandatory, as is the duty of the juvenile court to either summarily grant DEJ or examine the record, conduct a hearing, and make ‘the final determination regarding education, treatment, and rehabilitation....’ [Citations.] ... The court is not required to ultimately grant DEJ, but is required to at least follow specified procedures and exercise discretion to reach a final determination once the mandatory threshold eligibility determination is made.” (*Luis B.*, *supra*, 142 Cal.App.4th at p. 1123.)

Here, as the parties agree, minor appears to meet the statutory requirements for DEJ eligibility. The prosecutor, however, did not satisfy the statutory requirements to determine eligibility and provide notice, and the juvenile court failed to conduct the necessary inquiry. Thus, the court erred. This error requires that we remand the case to the juvenile court for further proceedings in compliance with section 790 et seq. (*Luis B.*, *supra*, 142 Cal.App.4th at p. 1123.)

II. Felony/Misdemeanor Declaration

The parties also agree that the juvenile court erred in failing to declare whether the

battery was a felony or a misdemeanor, and that the record does not demonstrate the court was aware it had the discretion. We agree.

Battery is ordinarily a misdemeanor (Pen. Code, § 242). But it may, in the sentencing court's discretion, be treated as a felony where, as here, the offense was committed for the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further or assist in criminal conduct by gang members. (Pen. Code, § 186.22, subd. (d); *People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1444.) In other words, the battery becomes a “wobbler” offense.⁴ Penal Code section 186.22, subdivision (d) is an alternative sentencing provision; it is not a sentence enhancement or a substantive offense. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898-899.)

Section 702 provides, in relevant part: “If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony.” “The language of [section 702] is unambiguous. It requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult.” (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 (*Manzy W.*) Remand for compliance with section 702 is required where the juvenile court fails to make the required felony/misdemeanor declaration of a wobbler offense and the record fails to show the court was aware of its discretion to impose a misdemeanor sentence. (*Manzy W.*, at pp. 1206-1209.)

The parties agree that the record does not establish that the juvenile court was aware of its discretion to impose a misdemeanor sentence. Furthermore, in this case, Penal Code section 186.22, subdivision (d) was alleged as a substantive offense (count 2).

⁴ A wobbler is any crime that may be punished as either a misdemeanor or felony. (See *People v. Vessell* (1995) 36 Cal.App.4th 285, 291-292.)

The court found count 1, the battery, to be a misdemeanor, and count 2 to be a felony. This was error.

In accord with *Manzy W.*, we will remand this matter to the juvenile court for it to declare minor's battery a felony or a misdemeanor.

DISPOSITION

The juvenile court's jurisdictional and dispositional orders are reversed and the matter is remanded to the juvenile court. On remand, the juvenile court is directed to conduct further proceedings in compliance with section 790 et seq. If the juvenile court denies DEJ to minor, it shall reinstate its jurisdictional findings only and conduct a new dispositional hearing at which the court shall declare, pursuant to section 702, whether the battery is a felony or a misdemeanor.